FILED
MAY 23 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. 753-754

REYNALD H. CHASE, T. ROLAND BERNER, et al,
Petitioners,

against

CARL J. AUSTRIAN and ROBERT J. BUTCHER, Trustees of Central States Electric Corporation, et al,
Respondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

ALFRED J. KIRSH
315 Law Building
Richmond, Virginia

LEO B. MITTELMAN
111 Broadway
New York 6, N. Y.

GEORGE E. ALLEN, SR.
611 Mutual Building
Richmond, Virginia
Of Counsel

NORMAN S. NEMSER
Attorney for Petitioners Chase, et al
52 Broadway
New York 4, N. Y.

T. ROLAND BERNER
Common and 6% Preferred Stockholder Pro Se
30 Broad Street
New York 4, N. Y.

INDEX

	Page
Opinions Below	2
Jurisdiction	2
Statute Involved	2
Questions Presented	3
Statement	4
Reasons for Granting the Writ	5
Conclusion	17

Citations

Cases:

Boston Terminal Co. v. *Comm. Mutual Savings Bank Committee,* 127 F. (2d) 707 (C.A. 1, 1942) 9

Bush Terminal Co., Re, 84 F. 2d 984 (C.A., 1936), cert. den. 299 U.S. 596..... 9

Campbell v. *Allegheny Corp.,* 75 F. (2d) 947 (C.A. 4, 1935) 6

Capital Foundry Corp., In re, 83 F. Supp. 413 (D.C. E.D.N.Y., 1949) 13

Page

Case v. *Los Angeles Lumber Products Co.*, 308 U.S. 106 (1939) 10

Childs Co., In re, 69 F. Supp. 856 (D.C.S.D.N.Y. 1946) 13

Continental Bank v. *Rock Island Ry.*, 294 U.S. 648 (1935) 6

Country Life Apartments, Inc. v. *Buckley*, 145 F. (2d) 935 (C.A. 2, 1944) 13

Dana v. *Wertheim*, 158 F. (2d) 982 (C.A. 2, 1947), cert. den. 331 U.S. 818 (1947) 12

Hotel Realty Co., In re, 69 F. Supp. 345 (D.C.D.-N.J., 1947) 13

Hubbell, Matter of, 302 N.Y. 246 (1951) 7

John Hancock Mutual Life Insurance Co. v. *Casey*, 141 F. (2d) 104 (C.A. 1, 1944) cert. den. 323 U.S. 713 9

Keystone Realty Holding Co., Re, 117 F. (2d) 1003 (C.A. 3, 1941) 7

Knight v. *Wertheim*, 158 F. (2d) 838 (C.A. 2, 1946) cert. den. 331 U.S. 818 ..... 12, 18

Loomis v. *Gila County*, 101 F. (2d) 827 (C.A. 9, 1939) 9

Lorraine Castle Apartments Building Corp., In re, 149 F. (2d) 55 (C.A. 7, 1945) cert. den. 326 U.S. 728 (1945) 13

Lowden v. *Northwestern National Bank & Trust Company*, 298 U.S. 160 (1936) 9

Milwaukee-Minn. R.R. v. *Soutter*, 69 U.S. (2 Wall.) 510 (1865) 8

Missouri Pacific R.R. Co., In re, 93 F. Supp. 832 (D.C.E.D. Mo., E.D., 1950) 7

National Realty Trust, In re, 166 F. (2d) 632 (C.A. 7, 1948) 12

	Page
Patent Cereals v. *Flynn*, 149 F. (2d) 711 (C.A. 2, 1945)	13
Public Industrials Corp, Re, 53 F. Supp. 960	8
Realty Associates Securities Corp., In re 156 F. (2d) 480 (C.A. 2, 1946)	9
St. Louis-Southwestern Ry., Re (E.D. Mo. E.D. July 14, 1947)	8
Skirvin v. *Mesta*, 141 F. (2d) 668 (C.A. 10, 1944)	8
Solar Mfg. Corp., In re, 176 F. (2d) 493 (C.A. 3, 1949)	13
Steelman v. *All Continent Corp.*, 301 U.S. 278	17
Sword S.S. Line v. *Vendramis*, 116 F. (2d) 665 (C.A. 2, 1940)	9
Sylvan Beach, Inc. v. *Koch*, 140 F. (2d) 852 (C.A. 8, 1944)	16
Technical Marine Maintenance Co. Inc., In re, 169 F. (2d) 548 (C.A. 3, 1948)	9, 16
Thompson v. *Magnolia Pet. Co.*, 309 U.S. 478	17
Utilities Power & Light Corp., In re, 29 F. Supp. 763 (D.C.N.D. Ill., E.D., 1939)	12
Vidor, Re, 46 F. Supp. 468	8
William Jameson & Co., In re, 47 F. Supp. 450 (D.C.S.D.N.Y., 1942)	9
Young v. *Higbee*, 324 U.S. 204 (1945)	7, 17
Statutes:	
Bankruptcy Act	2
Sec. 24	2
Sec. 68A	10
Sec. 77	7, 9

	Page
Sec. 77B	9, 10
Chapter X	3, 6, 9, 10, 11, 15, 17, 18
Sec. 102	10
Sec. 114	10
Sec. 115	10
Sec. 121	2
Sec. 130(1)	8, 11, 14
Sec. 180	3
Sec. 216	11, 13, 14
Sec. 637	16
Sec. 659	16
28 U.S.C., Sec. 1254	2

Other Authorities:

Collier on Bankruptcy, 14 ed. Vol. 6, pp. 4250-1	10
Remington on Bankruptcy, vol. 11 (ed. 1947) §4667, p. 540	10

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

No. .....

REYNALD H. CHASE, T. ROLAND BERNER, et al,
Petitioners,

against

CARL J. AUSTRIAN and ROBERT J. BUTCHER, Trustees of Central States Electric Corporation, et al,
Repondents.

PETITIONS FOR WRITS OF CERTIORARI TO THE U. S. COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioners herein, 6% preferred and common stockholders of the debtor, on behalf of themselves and all other such stockholders, pray that a writ of certiorari be issued to review the decree of the U. S. Court of Appeals for the Fourth Circuit entered on March 12, 1951, dismissing an appeal* from an order dated November 28, 1950, of the U. S. District Court for the Eastern District of Virginia and to review the decree of the same Court entered May 11, 1951, affirming an order dated March 13, 1951, of the said District Court. The first mentioned order of the District Court confirmed the plan of reorganization submitted by

* Although it might appear to the contrary from the order of the Court of Appeals, petitioners appeared in that Court by George E. Allen, co-counsel, who stated that we saved all our objections and desired a further opportunity to petition the Supreme Court for certiorari.

the trustees, pursuant to Chapter X of the Bankruptcy Act of 1938, as amended, 52 Stat. 883 et seq (11 U. S. C. §501 et seq), with respect to Central States Electric Corporation. The prior approval of the plan had been affirmed on appeal (183 F 2d 879, cert. den. 71 S. Ct. 350, 351). The second order with respect to which certiorari is here sought denied petitioners' application to dismiss the reorganization proceedings on the ground that the debtor was fully solvent and able to meet its matured indebtedness and current debts as they mature.

Opinion Below

Neither the Court of Appeals nor the District Court has rendered an opinion on either order.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U. S. C. §1254 made applicable by §§24 and 121 of the Bankruptcy Act of 1938 (11 U. S. C. §§47, 521).

Statute Involved

Sec. 221 of Chapter X of the Bankruptcy Act (11 U. S. C. §21) provides in pertinent part as follows:

> "The Judge shall confirm a plan is satisfied that— . . . (2) the plan is fair and equitable, and feasible".

The constitutional provision conferring the bankruptcy power upon the Congress and other pertinent statutory provisions are referred to sufficiently below.

Questions Presented

Since the debtor is now concededly solvent and amply able, without the aid of reorganization, to pay off all creditors and current debts as they mature, and since dismissal admittedly would not in any way prejudice the creditors whereas the Trustees' Plan seriously prejudices the junior stockholders, did not the Courts below

(a) exceed the constitutional bankruptcy power,

(b) violate the provisions of Chapter X, and

(c) abandon recognized principles of equity

in confirming the said Plan as fair and equitable and in refusing, on application, to dismiss the reorganization proceeding?

* * * * *

Note: In petitions Nos. 409 and 410, previously filed in this Court to review the decree of the Court of Appeals affirming the District Court's approval of the Trustees' Plan of Reorganization, a number of questions were presented. In the hearing on confirmation questions may be raised which were raised in the hearing on approval, §180 of Chap. X of the Bankruptcy Act (11 U.S.C. §580). Accordingly, since this Court, in accordance with its usual practice, did not assign reasons in denying the said petitions for certiorari, we do not know but what said denial was based on it preference to consider the questions at the confirmation stage rather than at the approval stage of the proceeding. We, therefore, present again for review the questions raised in the prior petitions. We respectfully incorporate herein by reference the said petitions for certiorari already on file with this Court (No. 409 and No. 410) and we state nothing further about said questions herein other than to indicate that an overwhelming majority of 6% stockholders voted to reject the Trustees' Plan.

Statement

The solvency of the debtor has been established in the proceedings already had and is disputed by none. The market value of the debtor's assets, whether taken now or at the time the plan was aproved, or confirmed, is greatly in excess of the claims of creditors with interest. As its balance sheet shows, the debtor had cash and readily marketable securities of more than $38,000,000.* The claims of debenture holders, including interest, amounted to about $21,000,000. There were and are no other substantial claims.

The cash and government bonds held by the debtor estate directly or indirectly alone amount to more than half of the claims. Substantially all of the remaining holdings are in securities readily saleable listed on the New York Stock Exchange or the New York Curb Exchange. Furthermore, responsible financial houses are ready, able and willing to refinance the obligations of the debtor (R. pp. 28-29). The trustees and the SEC have conceded, and there is no question of, the debtor's ability to pay off all of its debts in cash even without refinancing. Moreover, they cannot and do not claim that dismissal, with payment of debts, would in any respect whatever prejudice the creditors.

The Plan of Reorganization which the trustees are pushing along toward consummation destroys the going concern value of the enterprise and sacrifices virtually the entire interest of the 6% and common stockholders, whereas they will have a substantial interest in the corporation upon dismissal of the reorganization proceeding. At the same time said dismissal would result in the immediate payment in full of all matured debts including interest, and would save over $1,000,000 in bonuses alone, which is only part of the cost of the plan. Reorganization at best only postpones such minor capital gains taxes as might have to be paid and the likelihood is greater of an increase in the

---

* This is entirely apart from claims against Harrison Williams, John Foster Dulles, Sidney Weinberg and others for over $100,000,000, now *sub judice*.

capital gain tax rates than of a decrease. Besides, under existing law, the capital gains tax can be almost entirely avoided.

Reasons for Granting Writs

1. **The debtor being able to pay all creditors in full, to go forward with a reorganization plan solely to affect the rights of stockholders inter sese lies outside the constitutional bankruptcy power.**
2. **The refusal of the courts below to permit a solvent debtor to pay off its entire indebtedness is an unprecedented perversion of the bankruptcy act.**
3. **Th decision below conflicts with the principles laid down by this court and with decisions of the First, Second, Third and Ninth Circuits that where a debtor can pay off all its debts reorganization proceedings will be dismissed.**

In the Court of Appeals respondents conceded that the debtor is now both solvent *and* able to pay its matured debts in full and all others as they fall due—by selling part of its portfolio, or, if desired, by refinancing. Furthermore, they have not pointed to a single respect in which dismissal with payment of debts could in any way whatever prejudice a single creditor.

Then why confirm and consummate the plan instead of dismissing the reorganization proceeding? Because, respondents assert, the Court should, via the plan, determine the rights of the stockholders *inter sese*. This is the sole ground advanced by respondents. Their position is thus reduced to the naked proposition that although a debtor is fully solvent and able to pay its entire indebtedness without reorganization and without sacrifice, the Court should confirm the Trustees' Plan, and deny an application to dismiss, for the purpose of affecting the rights of stockholders *versus* other stockholders.

We submit that this is a flagrant perversion of the bankruptcy power, running counter to the purpose of Chap-

ter X of the Bankruptcy Act, inconsistent with prior decisions of this Court, in conflict with the decisions of other Courts of Appeals and unsupported by a single decision other than the one below sought to be reviewed here.

A. The Constitutional Bankruptcy Power

Corporate reorganizations are within the bankruptcy power because based on the debtor's bankruptcy or inability to pay debts as they mature *Continental Ill. Nat. Bank & Trust Co.* v. *C. R. I. & P. Ry.*, 294 U. S. 648; *Campbell 1* v. *Allegheny Corp.*, 75 F 2d 947 (C. A. 4 1935). Both of these conditions have now admittedly been eliminated from the instant case; for the debtor's assets not only exceed its liabilities, but are in liquid form, easily available to pay all present debts and future ones as they fall due. The reason for the bankruptcy power having disappeared, it would seem elementary that it can no longer be exercised over the opposition of an entire class of stockholders.

In the *Campbell* case, *supra,* the Court pointed out (at p. 954) that the bankruptcy power to "disturb the relation of the debtor's stockholders *inter se . . . is incidental to a necessary rearrangement of the relationship between the creditors and their debtor.*" (italics supplied). But admittedly, there is no such necessity here inasmuch as the debtor is now able to pay creditors in full without any re-arrangement of the indebtedness by plan or otherwise. Accordingly, there is no "necessary re-arrangement" of the creditor-debtor relationship in the case at bar to which the disturbance of the stockholder-stockholder relationship would be "incidental". Yet, the sole purpose of going through with the Trustees' Plan, as noted above, is that the trustee and the SEC wish to affect the rights of stockholders *inter sese* in the absence of any "necessary re-arrangement" of the creditor-debtor relationship.

Respondents admitted in the Court below that if the creditors had been paid off before confirmation or consum-

mation of the plan, the Court would be compelled, on application, to dismiss the reorganization proceeding. This concession, by itself, should be enough to demonstrate the error of the decision of the Court of Appeals; for *the trustees can base no right on their own wrong in not paying off the creditors, although the debtor is concededly able to do so.*

As the Court pointed out in *Re Missouri Pac. R. Co.* 93 F. Supp. 832, 859 (E. D. Mo. E. D. 1950)

> "If it is possible for the (debtor) to refund its obligation and thereby become able to meet its debts as they mature, I think that the Trustee has a duty to take steps to achieve that end. To keep a debtor which is able, or which can become able by refunding, to meet its debts as they mature in a (Chapter X) proceeding would not be in accord with the policy of that section and would be in violation of the Fifth Amendment." (The phrase "Chapter X" has been substituted for the phrase "Sec. 77". The Court noted that these provisions are "similar in language and purpose.")

Thus, the trustees have a duty in such circumstances to pay off the debt without waiting for a plan. Cf. *Matter of Hubbell,* 302 N. Y. 246 (1951). Indeed petitioner Berner expressly requested the Court to so instruct the trustees.

B. Chapter X and the Principles of Equity Incorporated Therein.

We start here with the axiomatic proposition that "Courts of bankruptcy are courts of equity and exercise essentially all equitable powers unless prohibited by the Bankruptcy Act". *Young* v. *Higbee,* 324 U. S. 204, 214; *Continental Bank* v. *Rock Island Ry. Co.* 294 U. S. 648; *Re Keystone Realty Holding Co.,* 117 F. 2d 1003 (C. A. 3, 1941). The Court's jurisdiction to dismiss the reorganization proceeding is predicated upon its "full equity powers to

dismiss the proceedings when their purpose has been achieved". *Re Missouri Pac. R. Co.*, 93 F. Supp. 832, 857 (E. D. Mo. E. D. 1950).

The debtor's petition for reorganization in this case alleged as the basic fact which gave rise to the Court's jurisdiction in the first instance that it was unable to meet its debts as they matured. "It follows therefore, that if, during the course of the reorganization proceedings the debtor becomes able to meet its debts, as they mature, by refunding or otherwise, the proceedings should be dismissed." *Re Missouri Pac. R. Co., supra,* at 858-9. See also *In re St. Louis-SW Ry. Co.* (E. D. Mo. E. D. July 14, 1947). It is a perversion of Congressional intent to apply here a statute which by its very terms is supposed to operate only on a corporation that is "insolvent or unable to pay its debts as they mature". (§130(1)). The authorities uniformly support this position.

(a) Ordinary bankruptcy proceedings are dismissed when the bankrupt becomes solvent and meets his debts. *Re Public Industrials Corp.*, 53 F. Supp. 960; *Re Vidor*, 46 F. Supp 468; *Re Missouri Pac. R. Co., supra.*

(b) The same rule applies in equity receivership proceedings. Thus in *Milwaukee & Minn. R. R.* v. *Soutter* (U. S.) 2 Wall. 510, Miller, J., for a unanimous Court held in an equity receivership case that the debtor's right to pay his debts "and have a restoration of his property by discharge of the receiver, is clear, and does not depend on the discretion of the Circuit Court" (521-522). And in *Skirvin* v. *Mesta*, 141 F. 2d 668 (C. A. 10, 1944) the Court of Appeals, following the *Soutter* case, reversed the District Court's denial of a motion to discharge a receiver and stated the following (at 673):

> "The power to vacate an appointment improvidently made or to terminate a receivership no longer needed is a necessary incident to the power to appoint

in the first instance. And where the appointment was not illegal but the reason or necessity for continuing it has ceased, the property should be discharged from the receivership and restored to its owners."

(c) Proceedings under Section 77 of the Bankruptcy Act, the language of which is not distinguishable on this point from the language of Chapter X, have also been dismissed when it developed during the course of the proceedings that the railroad debtors had become able to meet their debts as they matured. See *Re Missouri Pac. R. Co., supra,* and cases cited therein.

(d) The same rule has been applied in proceedings under Section 77B, the predecessor of Chapter X, and in proceedings under Chapter X.

Lowden v. *Northwestern Natl. Bank & Trust Co.* 298 U.S. 160, 163-4;

Re Bush Terminal Co., 84 F. 2d 984 (C.A. 2, 1936) cert. den. 299 U.S. 596

Boston Terminal Co. v. *Comm. Mutual Savings Bank Committee,* 127 F. 2d 707, 712 (C.A. 1; 1942);

Sword S.S. Line v. *Vendramis,* 116 F. 2d 665 (C.A. 2, 1940);

John Hancock Mut. Life Insurance Co. v. *Casey,* 141 F. 2d 104 (C.A. 1, 1944) cert. den. 323 U.S. 713;

Re Technical Marine Maintenance Co. 169 F. 2d 548 (C.A. 3, 1948)

Re Realty Associates Securities Corp., 156 F. 2d 480, 482 (C.A. 2, 1946)

Loomis v. *Gila County,* 101 F. 2d 827 (C.A. 9-1939)

William Jameson & Co. Inc., 47 F. Supp. 450 (SDNY, 1942);

Collier on Bankruptcy, 14th Ed. Vol. 6, pp. 4250-1;
Remington on Bankruptcy, Vol. 11 (Ed. 1947) §4667, p. 540.

The general bankruptcy and equity receivership cases are not only applicable by way of analogy but also directly, since the Court in Chapter X proceedings has the powers of the court in ordinary bankruptcy and of the court appointing an equity receiver. Bankruptcy Act, §§102, 114, 115.

In the *Lowden* case *supra,* the Supreme Court per Cardoza, J. stated:

> "A proceeding to reorganize is not a bankruptcy * * * (The mere initiation of a reorganization proceeding does not justify recourse to Section 68A) which was meant in its enactment to prescribe the rule of setoff upon a distribution of the assets. That state of administration, or the analogous state of the revision of the debts may never be attained in a proceeding to reorganize * * *. By that time (i.e., at a later stage in the proceeding), there may even be ability to pay demands as they mature. What is done at the beginning amounts to a little more than a provisional sequestration to give protection for the future."

And in *Case* v. *Los Angeles Lumber Products Co.,* 308 U.S. 106, 125-126, this Court expressly recognized that a corporate reorganization proceeding may be dismissed after approval of the original petition, Douglas, J. noting that the bankruptcy court has control over the debtor until "*actual dismissal* or final decree on confirmation" (*italics* supplied).

In the *Vendramis* case, *supra,* the Court placed the debtor in a position to pay all its creditors and dismissed the reorganization proceeding under Section 77B and Chapter X. In this connection the Court of Appeals for

the Second Circuit, per Augustus Hand, C.J., stated the following (at 668):

> "It would, therefore, seem (under §216 of Chapter X) that after the creditors were paid there was no basis for considering the plan proposed by Vendramis or any other plan of reorganization, merely for the purpose of adjusting controversies between stockholders * * *. Where all creditors have been eliminated so that the real objectives of the statute have been satisfied, it is useless, and hence unnecessary, to have the proposed plan considered when neither it nor any substitute could properly be adopted."

In the *John Hancock* case, *supra* the Circuit Court held that a Chapter X proceeding should have been terminated as either "unnecessary or impossible".

Remington, at *loc. cit. supra,* states the rule concisely as follows:

> "If the need for reorganization under Chapter X ceases to exist while a petition is pending, the proceeding should not be kept open."

As Judge Frank pointed out in *Realty Associates, supra,* "An estate, under Chapter X, is administered primarily for the creditors". Since the creditors here can easily be provided for out of liquid assets without reorganization, there is no justification for further proceeding with reorganization.

C. No Authorities Support the Decision Below.

Although respondents cited a number of cases below, not a single one of them supports their position, while a number of the cases cited in their briefs in the Court of Appeals indicate the contrary. We have in the previous section cited the authorities which sustain our claim. A brief word should be said about the other cases relied on by respondents.

They have cited a number of cases showing that courts proceed with reorganization of companies that have become solvent in the bankruptcy sense. That course is sanctioned by the express language of Chap. X (§130, 11 U.S.C. §530) but is completely beside the mark in a case such as the case at bar, where the debtor is also able, with liquid assets, to pay its matured debts and current debts as they fall due.

In this situation, as the cases cited hereinabove demonstrate, no plan of reorganization should be confirmed if any party in interest and especially if an entire class seeks dismissal.*

Knight v. *Wertheim,* 158 F. 2d 838 (C. A. 2, 1946) as respondents recognized in their brief below did not involve a motion to dismiss but a motion to modify a plan. Contrary to the respondents' suggestion, the Court did not in the companion case of *Dana* v. *Wertheim,* 158 F. 2d 982 (C. A. 2, 1946) *refuse* to dismiss the reorganization. What happened briefly was that after the court handed down its opinion in the *Knight* case, the *Dana* group, which had originally asked for a dismissal, was satisfied with the relief afforded to Knight; they therefore asked for and obtained a reversal of the District Court order refusing dismissal on the same terms and with the same relief as was given to Knight *in lieu* of its original request. In addition the debtor was not able to pay its debts, in that case, without the aid of a plan of reorganization. Thus the Second Circuit was not, in that case, called upon to, and did not, pass on a stockholder's right to obtain dismissal where the debtor can once more pay creditors in

---

* Certainly, the court's finding of original insolvency or inability to pay debts is conclusive. Sec. 149 (11 U.S.C. Sec. 549); *Re Utilities Power & Light Corp.,* 29 F. Supp. 763, 768 (D.C. N. D. Ill., E. D., 1939). But this clearly has no bearing on the authority of the court to act on a *later* change to solvency and ability to pay debts. This is the uniform holding of the Courts of Appeals for the First, Second, Third and Ninth Circuits, *supra.* Thus, in *Re National Realty Trust,* 166 F. 2d 632, 635-636 (C. A. 7, 1948), the basic question was whether the court abused its discretion in refusing to re-determine whether the original petition for reorganization should have been granted, and no showing was made of present ability to pay debts as they mature.

full and current debts as they mature. When the Second Circuit was faced with such an application to dismiss, it granted the motion. *Vendramis* case and cf. *Bush Terminal* case and *Re Realty Assoc. Sec. Corp., supra.*

Nor do the remaining cases relied on by respondents below support their position. *In none of them was a motion made to dismiss the proceeding on the ground that the corporation was both solvent and able to pay its debts as they mature.* Thus, for example in the *Lorraine Castle* case, 149 F. 2d 55 (C. A. 7, 1945), cert. den. 326 U. S. 728, the court held only that liquidation could be effected by a Plan; no one moved for dismissal and it is plain from the facts recited that the company was not in a position to pay debts as they matured; to the same effect are *Patent Cereals,* 149 F. 2d 711 (C. A. 2, 1945); *Country Life,* 145 F. 2d 935 (C. A. 2, 1944); and *Capital Foundry,* 83 F. Supp. 413 (D. C. E. D. N.Y. 1949). In the *Hotel Realty* case, 69 F. Supp. 345 (D. C. N. J., 1947), the court held that where the choices were either bankruptcy or reorganization, it would, on the facts presented, select reorganization as in the best interests of all. In the *Childs* case, 69 F. Supp. 856 (D. C. S. D., N.Y., 1946), no one sought dismissal and the only issue raised involved the allocation of securities in the reorganized company. In *Solar Mfg. Corp.,* 176 F. 2d 493 (C. A. 3, 1949), there was no claim made of ability to pay debts as they mature, nor was there any application to dismiss.

In short, the authorities relied on by respondents below do not help them and in some cases contradict their position. Moreover, respondents wholly failed below to distinguish the authorities which support our position.

Thus, they conceded below, the authority in equity receivership to dismiss under the circumstances presented and admitted that said authority carries over into Chapter X to the extent "not inconsistent with the provisions of this chapter". *Then they failed to point to a single inconsistent*

provision. Instead, they asserted what is wholly immaterial on their concession, that we had pointed to no provision in Chapter X that authorizes or requires dismissal here. Besides, this assertion is erroneous, inasmuch as we pointed to §130(1), which in express terms shows the Congressional intent to make Chapter X operate only on a corporation that is "insolvent or unable to pay its debts as they mature", and to §216, which indicates that the court can insist on proceeding with reorganization, over debtor or stockholder opposition, only if it is necessary to affect the rights of creditors by giving them less than full payment.

Respondents admit that if the creditors are paid off before the plan is confirmed and consummated, the proceeding must, on application, be dismissed. But as noted above, the trustees have a duty to pay off the debt, where the debtor is able to do so, without waiting for a plan, (*Missouri Pac.* case quoted supra, p. 8). Nowhere in respendents' brief below is there any argument or authority challenging this rule laid down by that court. The situation where *Lowden, supra,* contemplated dismissal was "ability to pay demands as they mature." The *Vendramis* case is further authority in support of this rule, for there the court first directed the payment of the debts, then ordered a dismissal. The court in *Loomis* v. *Gila County supra,* p. 11, went even further *by directing dismissal,* because the company had clearly become able to pay its debts as they matured, *without first paying the creditors.*

Furthermore, the distinction between payment and ability to pay is meaningless because the property in both situations is under the court's control. The respondents would hardly contend for the distinction if the debtor had enough cash on hand to pay off all debts. Then what difference can it make that the debtor, as here, has the wherewithal in the form of cash and cash equivalent, *viz,* highly marketable securities? Obviously you do not need a Plan

where the debtor, without a Plan, has enough liquid assets to meet its debts as they mature. The trustees in this very reorganization proceeding have not hesitated without a Plan to sell securities in the portfolio for cash to retire senior securities and for other purposes. As the court pointed out in the *Vendramis* case, where the creditors were paid without a plan, the *sine qua non* of a Plan is an affecting of the rights of creditors and such rights are not affected by full cash payment to them. *National City Bank* v. *O'Connell*, 155 F. 2d 329 (C. A. 2, 1946) and *Knight* v. *Wertheim, supra.*

What is the real situation? The trustees know they cannot consummate any Plan if they pay off the creditors, so they deliberately do not pay them although fully able to do so, merely because they want to have a Plan affecting the rights *inter se* of stockholders. This is plainly a perversion of Chapter X, designed as it was "primarily" for creditors and only "incidentally", where creditors' arrangements are "necessary", for stockholders' arrangements. *Campbell and Realty Associates Sec. Corp., supra.* Such a perversion of the bankruptcy power and Chapter X ought not to be countenanced. The correct procedure is to dismiss, either providing for payment of creditors (*Vendramis, supra*) or permitting the debtor to take care of same after dismissal (*Loomis* v. *Gila County, supra*).

We submit that there is no substance at all to respondents' suggestion below that dismissal is subject to the standards prescribed for Plans. No authority whatever is cited in support thereof. *Case* v. *Los Angeles, supra* says nothing of the kind; the Supreme Court's opinion obviously refers to the "standards prescribed by Congress" governing plans, which must be used by courts *when they are passing on applications to approve or confirm Plans.* It is plain nonsense to argue, as did the respondents that because the statute requires a *plan* to be "fair equitable and feasible" in the technical usage of those terms applied to

corporate reorganizations, therefore a *dismissal* must meet those technical requirements. The Plan is an exercise of bankruptcy power to take care of a corporation that cannot pay its debts as they mature; dismissal under the circumstances here presented is an acknowledgment that the bankruptcy power is no longer thus applicable since the company has become fully able to pay all debts. Chapter X has provisions as to what the court should do on dismissal (§§637, 659); none of these remotely suggests that the court should apply to dismissals the aforesaid standards governing plans. Not one of the many cases providing for dismissal makes any findings that such standards have been met or were required to be met by the dismissals therein ordered.

It had been suggested in the District Court that the reorganization proceeding should not be dismissed because that might result in undoing what has already been done; for example, the prosecution of the Debtor's claim against Harrison Williams and others already submitted for decision in the U. S. District Court for the Southern District of New York. But plainly this suggestion is not well taken since there is no significant difference in this respect between submission for decision and decision; and since in any event it is well established, as respondents agree, that the dismissal would not be *ab initio* but would be as of the date set forth in the order of dismissal with the Court exercising its full powers to do equity by all the parties. "The bell once rung could not be unsounded." *Re Technical Marine Maintenance Co.*, 169 F. 2d 548, 552 (C. A. 3, 1948). *Sylvan Beach, Inc.* v *Koch*, 140 F. 2d 852 (C. A. 8, 1944).

The Court could also *inter alia* date the order of dismissal, making it effective, at a time subsequent to the decision of the U. S. Court in New York, enjoin the voting of stock that had been used to perpetrate serious wrongs on the debtor, and incorporate other terms and conditions

deemed appropriate by a court of equity. Indeed, the District Court has already issued an injunction against Williams' asserting an interest in the stock or any control over the debtor. Respondents do not dispute that this decree, upon dismissal, would remain in full force and effect. *Technical Marine* and *Sylvan Beach* cases, *supra.* Cf. *Thompson* v. *Magnolia Pet. Co.*, 309 U. S. 478, 483; *Steelman* v. *All Continent Corp.*, 301 U. S. 278; *Young* v. *Higbee*, 324 U. S. 204. Besides, the common stockholders would even be willing, as a condition of dismissal, to allocate one-third of the votes to each of the three classes of stocks.

CONCLUSION

The decision below, if allowed to stand, will make of Chapter X a convenient device for preferred stockholders, who find themselves in control of the corporation which has failed for a year or two to maintain preferred dividends, to force the Company into Chapter X for the real purpose of prejudicing or even getting rid of the common stockholders. All that will be necessary will be for the said preferred stockholders in control to deliberately place the Company in a position where for the time being it can not pay its debts as they mature, following this up with a voluntary petition under Chapter X. Here the whole scheme of Chapter X is subverted: affecting the rights of creditors becomes the incident and affecting the rights of stockholders *inter se* becomes the primary concern, although Congress clearly intended the exact opposite. Once the absolute right of a debtor to pay its debts is denied, there is nothing which can prevent such abuses of the reorganization process. If this Court does not reaffirm that right here, it will inevitably be called upon to resolve the confusion which is certain to follow.

Under the bankruptcy power, under Chap. X and in equity, the primary purpose of a corporate reorganization plan is to affect the rights of creditors and where there is no need to affect said rights because the solvent debtor has liquid assets clearly adequate to pay debts as they mature, the bankruptcy power, Chap. X and equity no longer permit confirmation—or, after confirmation—consummation of a reorganization plan over the opposition of a party in interest or against an application to dismiss.

Until the final decree, which has not been entered here, the "creditors remain creditors" and they do not and cannot ask more than full payment of principal and interest. *Knight* v. *Wertheim & Co.*, 158 F. 2d 838 (C. A. 2, 1946) cert. den. 331 U. S. 818. *A fortiori* a stockholder has no status to insist upon a continuation of the proceeding where provision in full can be made for the creditors. Confirmation and/or consummation of the plan is "useless", "unnecessary" and improper. *Vendramis* case, *supra.*

The precise issue raised here has never been decided by this Court. It is of vital importance in the administration of Chap. X that this critical question be authoritatively decided. The decision below changes the whole fabric of our bankruptcy and reorganization law. There are two fundamental issues involved here: (1) the right of a debtor to avoid bankruptcy reorganization once he becomes able, without the aid of such reorganization, to pay all creditors and all debts as they mature; and (2) the right of stockholders to avoid destruction of going concern values with complete sacrifice of their property when creditors may be fully provided for without such destruction and sacrifice. Both these issues require the consideration of this Court.

We submit that the scope of the bankruptcy power as construed by this Court, the principles of equity prescribed by this Court for bankruptcy and reorganization proceedings, and the purpose and reach of Chap. X as laid down

in numerous authorities demonstrate the need for review and reversal of the decisions below.

For the reasons stated, this petition for a writ of certiorari should be granted.

Respectfully submitted,

T. Roland Berner, *PRO SE*
30 Broad Street
New York, N. Y.

Norman S. Nemser
Attorney for Chase et al.

Of Counsel:

Leo B. Mittelman
George E. Allen, Sr.
Alfred J. Kirsh

INDEX.

	PAGE
Opinions Below	1
Jurisdiction	2
Statutes Involved	2
Questions Presented	2
Statement of Facts	2
Rulings Below	8
Argument	9
Conclusion	19
Appendix	21

TABLE OF CASES CITED:

Boston Terminal Co. v. *Comm. Mutual Savings Bank Committee,* 127 F. (2d) 707 (C. A. 1, 1942) 16n

Campbell v. *Alleghany Corp.,* 75 F. (2d) 947 (C. A. 4, 1935), cert. den. 296 U. S. 581 (1935) 12n, 14n

Capital Foundry Corp., In re, 83 F. Supp. 413 (E. D. N. Y., 1949) 11n

Case v. *Los Angeles Lumber Products Co.,* 308 U. S. 106 (1939) 12, 15

Childs Co., In re, 69 F. Supp. 856 (S. D. N. Y., 1946).. 11n

Consolidated Rock Products Co. v. *DuBois,* 312 U. S. 510 (1941) 12n, 13n

Continental Illinois Nat'l Bank & Trust Co. v. *C. R. I. & P. R. Co.,* 294 U. S. 648 (1935) 13n, 14n

Country Life Apartments, Inc. v. *Buckley,* 145 F. (2d) 935 (C. A. 2, 1944) 11n

Dana v. *Wertheim,* 158 F. (2d) 982 (C. A. 2, 1947), cert. den. 331 U. S. 818 (1947) 11n

PAGE

Hotel Realty Co., In re, 69 F. Supp. 345 (D. N. J., 1947) 11n

John Hancock Mutual Life Insurance Co. v. *Casey,* 141 F. (2d) 104 (C. A. 1, 1944), cert. den. 323 U. S. 713 (1944) 16n

Knight v. *Wertheim,* 158 F. (2d) 838 (C. A. 2, 1946).. 11n

Loomis v. *Gila County, Ariz.,* 101 F. (2d) 827 (C. A. 9, 1939) 16n

Lorraine Castle Apartments Building Corp., In re, 149 F. (2d) 55 (C. A. 7, 1945), cert. den. 326 U. S. 728 (1945) 11n

Lowden v. *Northwestern National Bank & Trust Co.,* 298 U. S. 160 (1936) 13n

Milwaukee-Minn. R. R. v. *Soutter,* 69 U. S. (2 Wall.) 510 (1865) 16n

Missouri Pacific R. R. Co., In re, 93 F. Supp. 832 (D. C. Mo., 1950) 13n

National Realty Trust, In re, 166 F. (2d) 632 (C. A. 7, 1948) 18

Otis & Co. v. *Securities and Exchange Commission,* 323 U. S. 624 (1945), rehearing den. 324 U. S. 887 (1945) 13n, 15

Patent Cereals v. *Flynn,* 149 F. (2d) 711 (C. A. 2, 1945) 11n

Portland Electric Power Co., In re, 162 F. (2d) 618 (C. A. 9, 1947), cert. den. 332 U. S. 837 (1947).. 12n

Realty Associates Securities Corp., In re, 65 F. Supp. 116 (E. D. N. Y., 1946), aff'd 156 F. (2d) 480 (C. A. 2, 1946) 16n

620 Church Street Building Corp., In re, 299 U. S. 24 (1936), rehearing den. 299 U. S. 623 (1936) 15n

Solar Mfg. Corp., In re, 176 F. (2d) 493 (C. A. 3, 1949) 11n

PAGE

Sword S. S. Line v. *Vendramis*, 116 F. (2d) 665 (C. A. 2, 1940) 16n

Technical Marine Maintenance Co., In re, 169 F. (2d) 548 (C. A. 3, 1948) 16n

Utilities Power & Light Corp., In re, 29 F. Supp. 763 (N. D. Ill., 1939) 12n, 13n

William Jameson & Co., In re, 47 F. Supp. 450 (S. D. N. Y., 1942) 16n

Williams v. *Austrian*, 331 U. S. 642 (1947) 3n, 18n

Young v. *Higbee*, 324 U. S. 204 (1945) 13n

OTHER AUTHORITIES CITED:

National Bankruptcy Act:

Chapter X 2, 6, 8, 10, 11, 12, 12n, 13, 13n, 14n, 15, 16, 16n, 17, 18

Section 149 (11 U. S. C. Sec. 549) 3n, 21

Section 179 (11 U. S. C. Sec. 579) 12n, 21

Section 216 (11 U. S. C. Sec. 616) 21, 22

Section 236 (11 U. S. C. Sec. 636) 12n, 16, 17, 22

Chapter XI 16n

Section 24 (11 U. S. C. Sec. 47) 2

Section 77 (11 U. S. C. Sec. 205) 13n

Section 77(g) (11 U. S. C. Sec. 205(g)) 13n

Section 121 (11 U. S. C. Sec. 521) 2

28 U. S. C. Section 1254 2

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

Nos. 753, 754.

REYNALD H. CHASE and T. ROLAND BERNER,
Petitioners,

vs.

CARL J. AUSTRIAN and ROBERT G. BUTCHER, Trustees of Central States Electric Corporation, Debtor, *et al.*,
Respondents.

ON PETITIONS FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT.

BRIEF IN OPPOSITION FOR TRUSTEES, BOYCE DEBENTURE HOLDERS' COMMITTEE, REEVE DEBENTURE HOLDERS' COMMITTEE AND 7% PREFERRED STOCKHOLDERS' COMMITTEE—RESPONDENTS.

Opinions Below.

The District Court of the United States for the Eastern District of Virginia wrote no opinion in either No. 753 or No. 754. That Court's findings and order in No. 753 ~~(R. ——)~~[1] and No. 754 (R. 26-27) are unreported. No opinion was written by the Court of Appeals for the Fourth Circuit in No. 753, and its opinion in No. 754 (R. 92-95) has not yet been reported.

[1] References in this brief are to R., signifying ~~printed~~ record, and S., signifying the Advisory Report of the Securities and Exchange Commission which is submitted in mimeographed form with the ~~printed~~ record herein.

Jurisdiction.

The orders of the Court of Appeals for the Fourth Circuit were entered on March 12, 1951, in No. 753 (R. 10-11), and on May 11, 1951, in No. 754 (R. 91). The petitions for writs of certiorari were filed on May 22, 1951. The jurisdiction of this Court is invoked by petitioners under Sections 24 and 121 of the Bankruptcy Act (11 U. S. C. Secs. 47 and 521) and under 28 U. S. C. Section 1254.

Statutes Involved.

The applicable provisions of Chapter X of the Bankruptcy Act are set forth in the Appendix to this brief.

Questions Presented.

Whether the Constitution or Chapter X of the Bankruptcy Act forbids the consummation of an approved and confirmed plan of reorganization of a debtor whose assets had risen sufficiently in value during the course of the proceeding so that they exceeded its liabilities, but whose matured debt could only be paid by liquidation of substantial assets at considerable cost or by a complex scheme of refinancing.

Statement of Facts.

Central States Electric Corporation (hereinafter "the Debtor" or "Central States") has been in reorganization under Chapter X of the Bankruptcy Act since February, 1942. At the time of the filing and approval of the petition for reorganization, Central States was insolvent and

unable to meet its debts as they matured, total assets having a value of approximately $1,400,000 while liabilities exceeded $18,000,000.[2] Since February, 1942, through a long and complicated series of steps, efforts have been made to dispose of intercompany claims against Central States, to marshal its assets, and to formulate and consummate a plan of reorganization. Those efforts culminated in the Plan of Reorganization proposed by the Trustees in December, 1948, which, after lengthy hearings and with minor modifications, has been approved and confirmed, and is about to be consummated. Petitioners herein now seek to upset this judicially approved and confirmed plan by an order dismissing this proceeding.

Central States' assets, exclusive of contingent assets,[3] consist principally of 66% of the common stock of Blue Ridge Corporation, an operating diversified investment company,[4] common stockholdings in public utility holding and operating companies, Government bonds, and cash. These assets are worth approximately $38,238,000 on the basis of present market levels (R. 50). Against these assets, and without taking into account more than $1,000,000 of required reserves for undetermined and contingent liabilities and expenses, Central States has matured debenture indebtedness of approximately $21,632,000, including interest of approximately $3,596,000 (R. 47, 49), and a liability on its senior 7% preferred stock of approximately $16,231,000, including accrued dividends of about $9,351,000 (R. 49). Subordinate to these claims

---

[2] No appeal was taken from the order of the District Court approving the petition for reorganization. No question has ever been, or is now, raised as to the validity of that order. *Cf.* Chapter X, Sec. 149 (11 U. S. C. Sec. 549).

[3] The contingent assets consist primarily of a lawsuit being prosecuted by the Trustees against the Debtor's former management, principally Harrison Williams (S. 12). That lawsuit was before this Court in *Williams* v. *Austrian*, 331 U. S. 642 (1947).

[4] The holdings in Blue Ridge, which has approximately 16,000 public stockholders, account for approximately 55% of Central States' total assets (R. 50).

are the interests of the junior stockholders of Central States, which consist of several series of 6% preferred stock with a liquidating preference of approximately $32,120,000, including accrued dividends of $16,521,000 (R. 49), and 9,830,880 shares of common stock, about half of which are owned by Harrison Williams.[5]

It is plain, on the basis of the values of $38,238,000, that, apart from what may be recovered in the Trustees' litigation, the 6% preferred stockholders have no interest in the assets of Central States and the common stockholders, who are more than $32,000,000 under water, can only hope for a stupendous recovery in the Trustees' lawsuit if they are ever to realize anything on their stock.

The Plan of Reorganization which has been approved and confirmed provides, in brief, that all the assets of Central States, except contingent assets, will be transferred to a newly organized open-end investment company in exchange for its common stock, and that Blue Ridge will be merged into the Reorganized Company. The stock of the Reorganized Company, reflecting the market values of the assets which it acquires from Central States, will be distributed to Central States' debenture holders in exchange for their claim for principal and interest, and then to its 7% preferred stockholders in exchange for their claim for the par value of their shares plus accrued dividends. To the extent that the stock distributed to the 7% preferred stockholders is inadequate to satisfy their claim, they will have a deficiency claim against the contingent assets. The common stockholders, and under present values the 6% preferred stockholders, will not receive

---

[5] The general structure of the Central States' pyramided system when the petition for reorganization was filed is set forth in the Advisory Report of the Securities and Exchange Commission. Under the direction of the District Court, the Trustees of Central States have reduced the leverage of the system by the retirement of the preferred stocks and debt obligations of its subsidiaries American Cities Power and Light Corporation and Blue Ridge, and by liquidating and dissolving American Cities.

any stock of the Reorganized Company. They will receive only interests in the contingent assets in the order of their priorities after satisfaction of the claims of the 7% preferred stockholders (S. 14-15).

At all stages of this proceeding, representatives of the 6% preferred stockholders and common stockholders have had the opportunity to oppose the Trustees' Plan and have offered and urged alternative plans of reorganization. The essence of their opposition to the Trustees' Plan has been that the distributions provided thereunder will deny to them any participation in the Reorganized Company and will confine them to the contingent assets. Based upon their insistence that they had a right to participate in the Reorganized Company despite the lack of equity available for them, these junior interests submitted plans under which new money, to be provided for the enterprise through bank loans and underwritings of new common stock, would be used to pay off all or part of Central States' debt, and new interests in the Company would be allocated to the 6% preferred and common stockholders by the issuance to them of warrants to purchase the new common stock.[6]

Lengthy hearings were held on all of the plans of reorganization submitted. After considering all the evidence, the District Judge referred the plans to the Securities and Exchange Commission for advisory report. The Report of the Commission concluded that the Trustees' Plan was the only fair and equitable, and feasible, plan and that the plans of all the junior interests were objectionable, in large part because they would create an interest in the Debtor for the junior security holders who had no equity, at the expense largely of the 7% preferred stockholders, and would give these junior security holders control of, and an opportunity to specu-

[6] The junior interests also sought to preserve the high leverage in the system by retaining the original three-tiered pyramid structure of Central States and its subsidiaries (S. 32-37).

late with, a company in which they were found to have no equity (S. 44-48).

The conclusions of the Commission were adopted by the District Court in approving the Trustees' Plan (R. 37-45) and were affirmed by the Court of Appeals on the appeal from the District Court's order of approval, 183 F. (2d) 879. This Court denied certiorari, 340 U. S. 917 (1951).

Thereafter, at hearings held on confirmation of the Trustees' Plan, the junior security holders repeated the objections they had previously made to approval of the Plan (R. 3-9, R. 15-16). These objections were rejected by the District Court, which confirmed the Plan (R. ———), and an appeal by the present petitioners from that Court's order of confirmation was dismissed by the Court of Appeals for failure to prosecute (R. 10-11).

Following confirmation of the Plan by the District Court, and pending their appeal therefrom, petitioners filed their motion to dismiss the reorganization proceeding. Petitioners contended in the District Court that because Central States' assets exceed its liabilities, and the liabilities can be extinguished either by a refinancing scheme or by liquidation of assets, the proceeding must be dismissed so that the Debtor can adopt one or the other of those alternatives free from the supervision of the Court and the protection of Chapter X. This last-minute effort to upset the reorganization, and by dismissal to restore control of the Debtor to the junior security holders, who are found to have no equity in the Company, is based upon proposals, facts, and legal arguments which have been considered at great length and rejected several times in this proceeding.

Petitioners' latest scheme of refinancing (R. 23-29, 52) is indistinguishable from two of the Plans of Reorganization which, at an earlier stage in this proceeding, were

rejected by the Courts below.[7] The alternative suggestion —liquidation of all or part of the Debtor's assets—was considered several times in this proceeding prior to approval of the Plan, and each time was rejected because the tax consequences and the other costs of liquidation would substantially diminish the Debtor's assets (R. 50, 51, 53-97-98).[8]

Nor are petitioners' proposals based on any new facts or changes in the condition of the Debtor. At the time of approval of the Plan, at the time of appeal from the order of approval, at the time certiorari was denied, and at the time of confirmation of the Plan, as today, Central States' assets substantially exceeded its liabilities (indeed, today the amount of the excess is slightly less than formerly) (R. 46, 50), those assets were marketable and could have been sold to pay off the debt (although with substantial costs and other consequences noted), and a loan and underwriting were equally obtainable (and were in fact offered in connection with the disapproved plans sponsored and/or supported by petitioners).

Indeed, even the legal formula which petitioners urge in their present motion was presented to and rejected by the Courts below several times in this proceeding. Not only was dismissal of the proceeding because of the solvency of the Debtor urged in the District Court

---

[7] See the Debtor's Amended Plan (R. 81-89) and the Amended Plan of the Kelly Committee for 6% Preferred Stockholders (R. 13-21, 69-80), the latter of which was prepared jointly with petitioner Berner (R. 52-53). The District Court found both Amended Plans not worthy of consideration for purposes of referral to the Securities and Exchange Commission (R. 45). The Court of Appeals affirmed those conclusions, 183 F. (2d) 879, and this Court denied certiorari, 340 U. S. 917 (1951).

[8] The sale of sufficient securities to pay off the debt would also require substantial liquidation of Blue Ridge (R. 50-51), a solvent operating investment company with 16,000 public stockholders, would reduce the Debtor's assets from $38,283,000 to $13,606,000 (R. 51), and would radically alter the nature of the entire enterprise, so that serious doubt would exist as to whether it should be continued.

(R. 64-67) but, on the unsuccessful appeal from the order of approval, which this Court declined to review, one of the appellants contended explicitly in the Court of Appeals that the proceeding must be dismissed because the Debtor had become solvent (R. 68).

Rulings Below.

Petitioners contended in the Courts below that (1) a District Court constitutionally has no jurisdiction over the debtor and is required to dismiss a reorganization proceeding when the debtor becomes solvent in the bankruptcy sense and can meet its debts by selling assets or by a scheme of refinancing, and (2) Chapter X requires, and in any event authorizes, dismissal of this proceeding, and as a matter of equity the District Court should dismiss.

The District Court, after hearing argument, rejected both contentions and found that:

> "it is not required as a matter of law, constitutionally or under the Bankruptcy Act or otherwise, to dismiss this reorganization proceeding, that the purposes and provisions of Chapter X of the Bankruptcy Act are inconsistent with dismissal of this reorganization in the circumstances here present, that no material change in the circumstances of the Debtor has occurred since the Plan of Reorganization herein was approved by this Court on April 24, 1950, that all of the contentions urged in support of the aforesaid petitions and motion were available to be made at the time of the hearings and arguments on approval of the Plan of Reorganization, that the matter of dismissal of this proceeding was considered by this Court in connection with the approval of the Plan and that to the extent that this Court has discretion to grant the aforesaid petitions and motion, upon a

consideration of all the facts and the entire record in this proceeding, said petitions and motion should be denied;" (R. 27).

The Court of Appeals rejected petitioners' contentions and affirmed the order of the District Court. It held, as had the District Court, that petitioners' motion to dismiss was "nothing more than an attempt . . . to relitigate questions which were before us and were decided when we affirmed the order of the District Court approving the plan of reorganization;" that "neither in law nor in common sense" was dismissal of this Reorganization required, and that for the District Court to have ordered dismissal in the circumstances of this case would have been an abuse of discretion (R. 92-95).

Argument.

As we have pointed out, the proposals, the facts, and the legal arguments now urged by petitioners for dismissal of this proceeding were all presented at the time of the approval of the Plan. Petitioners' present contentions were rejected by the District Court and the Court of Appeals, and certiorari was denied by this Court.*

---

* The present petitions for certiorari seek review also of the order of the Court of Appeals dismissing an appeal by petitioners from the District Court's order confirming the Plan (Pet., p. 3). The Court of Appeals' order shows (R. 10-11), and petitioners cannot deny, that petitioners failed to prosecute that appeal; and as the correspondence in the record shows, their failure was not inadvertent ~~(R.).~~ Under such circumstances, petitioners are hardly entitled to a grant of certiorari to review, on the merits, contentions which the Court of Appeals neither heard nor passed upon in dismissing the appeal. In any event, as the record shows (R. 3-4, 12-15), and petitioners concede (Pet., p. 3), in seeking review of the Court of Appeals' order on confirmation, they are merely attempting to "present again for review the questions raised in the prior petitions" for certiorari which were denied by this Court in Nos. 409 and 410

[Footnote continued on following page.]

1. Petitioners treat the issue here as though it had not been answered earlier in this proceeding or elsewhere in the body of reorganization law. Moreover, with a delusive simplicity, they formulate the question as though it were whether a debtor should be dismissed from reorganization when it becomes able, "without the aid of reorganization, to pay off all creditors and current debts as they mature" (Pet., p. 3). The difficulty with this formulation is that it misstates the question, because the Debtor here cannot meet its debts "without the aid of reorganization."

This Debtor has more than 30,000 security holders, holding four different classes of securities, one of which has $3,596,000 of interest arrears, and two others of which have $25,872,000 of dividend arrears. And although the Debtor is solvent in the bankruptcy sense, it is not now able to meet its matured debts and can only become able to do so by a complex scheme of refinancing (involving, as petitioners suggest, new debt and a common stock underwriting), or by liquidating its assets at the cost of diminishing the estate and the assets of its subsidiary, Blue Ridge, which has over 16,000 public security holders, and reducing its operations from those of a $38,000,000 enterprise to those of a $13,000,000 enterprise. The question is whether in such circumstances either the Constitution or Chapter X forbids consummation of the approved and confirmed Plan of Reorganization, and requires dismissal of the proceeding. This question is not novel and was answered correctly by both Courts below, in conformity with the decisions of this Court and the lower federal courts.

[Footnote continued from preceding page.]

this Term. There is even less reason for this Court to review those questions now than there was in January, since in the interim, at considerable expense, the prolonged process of reorganization has been brought to the verge of completion. With respect to the merits of the questions involved, we respectfully refer the Court to our Brief in Opposition in Nos. 408-411 this Term.

The decisions under Chapter X, uniformly and without exception, make plain that a proposal either to refinance a debtor in the manner suggested by petitioners or to pay debts by liquidating the debtor's assets necessarily presents a plan of reorganization, which is to be appraised under the standards of Chapter X and adopted under the supervision of the Court.[9] Such proposals cannot be made the basis for dismissing the proceeding,[10] regardless of whether the debtor has become solvent in the bankruptcy sense during the reorganization and can pay off its creditors by adopting a proposal to liquidate[11] or to refinance.[12] It is because the adoption and execution of either of these alternatives depend upon controversial judgments and complex steps effecting sharp altera-

---

[9] Liquidations: *Patent Cereals* v. *Flynn*, 149 F. (2d) 711 (C. A. 2, 1945); *In re Hotel Realty Co.*, 69 F. Supp. 345 (D. N. J., 1947); *Country Life Apartments, Inc.* v. *Buckley*, 145 F. (2d) 935 (C. A. 2, 1944); *In re Lorraine Castle Apartments Building Corp.*, 149 F. (2d) 55 (C. A. 7, 1945), cert. den. 326 U. S. 728 (1945). *Cf. In re Capital Foundry Corp.*, 83 F. Supp. 413 (E. D. N. Y., 1949).

Refinancings: *In re Childs Co.*, 69 F. Supp. 856 (S. D. N. Y., 1946); *Knight* v. *Wertheim*, 158 F. (2d) 838 (C. A. 2, 1946).

[10] *Patent Cereals* v. *Flynn, supra* n. 9; *In re Solar Mfg. Corp.*, 176 F. (2d) 493 (C. A. 3, 1949).

[11] *In re Lorraine Castle Apartments Building Corp.; In re Hotel Realty Co., supra* n. 9.

[12] In the Equitable Office Building reorganization (S. D. N. Y., Docket No. 78,476), substantial improvements occurred in the financial condition of a solvent debtor *after* approval of a plan. Because, therefore, it became possible to refinance the debtor in a manner similar to that here proposed, and the debenture holders would, under the previously approved plan, have received considerably more than the full amount of their claim, the Court was urged by two separate parties, respectively, (a) to modify the original plan and (b) to dismiss the reorganization. The District Court denied both requests, but the Court of Appeals held that in view of the changes in the debtor's circumstances after approval of the plan, the case should be remanded for the plan to be modified under the supervision of the District Court (*Knight* v. *Wertheim, supra* n. 9; *Dana* v. *Wertheim*, 158 F. (2d) 982 (C. A. 2, 1947), cert. den. 331 U. S. 818 (1947); see also *In re Childs Co., supra* n. 9).

tions of security holders' rights,[13] that on the one hand, they must be tested by the standards of Chapter X, whether the debtor is "solvent or insolvent in either the equity or the bankruptcy sense,"[14] and on the other hand, "the explicit standards for dismissal" in Chapter X[15] do not authorize the debtor to "withdraw and oust the court of jurisdiction" to supervise the selection and execution of either of such alternatives. *Case* v. *Los Angeles Lumber Products Co.*, 308 U. S. 106, 126, n. 23 (1939).

---

[13] *E. g.*, whether to refinance or to sell assets; if the former, how, without the protective custody of the court, all the numerous steps can be taken so that warrants can be issued, securities can be exchanged, etc., to provide funds in time to retire the currently matured $21,600,000 of debt; if the latter, which securities are to be sold, at what times, and by which company, *i. e.*, Central States or Blue Ridge, in the face of the immediate demand for payment of the matured debt, and whether if that alternative were to be adopted there would be any economic justification for further continuance of the enterprise.

Payment of the debt by either alternative would affect all classes of the Debtor's security holders whose interests Chapter X was designed to protect. Refinancing would leave unsatisfied and unadjusted not only the claims of the Debtor's stockholders against its assets but also " 'the relation of the debtor's stockholders inter se.' " (*Cf. Campbell* v. *Alleghany Corp.*, 75 F. (2d) 947, 954 (C. A. 4, 1935), cert. den. 296 U. S. 581 (1935).) Liquidation of a substantial portion of the Debtor's portfolio would also leave those claims unresolved and, in addition, would entail tax and other costs (R. 50, 51, 53-56, 97-98) which would reduce by $1,800,000 the assets available to satisfy their claims.

[14] *Consolidated Rock Products Co.* v. *DuBois*, 312 U. S. 510, 527 (1941). That Chapter X contemplates the reorganization of companies which become solvent during the reorganization process is apparent on the face of the statute; *e. g.*, Section 179 (11 U. S. C. Sec. 579) provides that if a plan is submitted with respect to a solvent corporation, stockholders as well as creditors are entitled to vote on it. *In re Portland Electric Power Co.*, 162 F. (2d) 618 (C. A. 9, 1947), cert. den. 332 U. S. 837 (1947). *Cf. In re Utilities Power & Light Corp.*, 29 F. Supp. 763 (N. D. Ill., 1939).

[15] The only provision of Chapter X which authorizes dismissal of a reorganization after a petition has been approved (Sec. 236 [11 U. S. C. Sec. 636]) contains no requirement or suggestion that the reorganization be dismissed because the debtor has become solvent. It authorizes dismissal only if a plan of reorganization is not (or cannot be) proposed, approved, accepted, confirmed, or consummated.

That Chapter X does not exceed the constitutional reach of the Bankruptcy power, in thus conferring jurisdiction over proposals to pay the debts of companies which become solvent during reorganization, is as apparent from the opinions of this Court[16] as from the uniform course of those decisions in the lower federal courts which deal with proposals similar to those here suggested.[17] And it is now too well established for doubt that in protecting stockholders along with creditors, Chapter X is a constitutional exercise of the Bankruptcy power.[18]

---

[16] *Continental Illinois Nat'l Bank & Trust Co.* v. *C. R. I. & P. R. Co.*, 294 U. S. 648 (1935); *Consolidated Rock Products Co.* v. *DuBois, supra* n. 14, at 327; *Young* v. *Higbee*, 324 U. S. 204, 214 (1945); *cf. Lowden* v. *Northwestern National Bank & Trust Co.*, 298 U. S. 160, 163-164 (1936). Compare also *Otis & Co.* v. *Securities and Exchange Commission*, 323 U. S. 624, 634 (1945), rehearing den. 324 U. S. 887 (1945), citing with approval *In re Utilities Power & Light Corp., supra* n. 14, holding the absolute priority doctrine applicable as between classes of stockholders of a solvent debtor.

[17] See, *e. g.*, cases cited in notes 11, 12 and 14, *supra*. The suggestion to the contrary in *In re Missouri Pacific R. R. Co.*, 93 F. Supp. 832, 858-859 (D. C. Mo., 1950), was unnecessary for the decision, as the opinion shows. Indeed, nothing in Section 77 *required* a dismissal in that case, although in the circumstances there present, involving the outright refunding of the debt of a company which had only a single class of stockholders and presented no problems as to differing priorities among classes of stockholders, Section 77(g) (11 U. S. C. Sec. 205(g)) might *permit* the District Court to dismiss in order to avoid "undue delay in a reasonably expeditious reorganization." *Cf. In re St. Louis-Southwestern Ry.* and other cases cited in *In re Missouri Pacific R. R. Co.*, at 858, and compare with cases cited in note 23, *infra*.

[18] Petitioners repeatedly urge (Pet., pp. 5, 6, 15) that the only interest which is protected by consummating this reorganization is that of the 7% stockholders, and that Chapter X is being perverted unconstitutionally to apply only as between classes of stockholders in circumstances in which creditors no longer require its protection. Petitioners ignore the continuing need of the creditors (whose representatives opposed petitioners' motion to dismiss this proceeding) for the protective umbrella furnished by Chapter X. The creditors' claims are fully matured and wholly unpaid, and can only be paid by a liquidation of assets or a

[Footnote continued on following page.]

2. Petitioners state that the second of the two "fundamental issues" presented by this case is "the right of stockholders to avoid the destruction of going concern values with complete sacrifice of their property when creditors may be fully provided for without such destruction and sacrifice." (Pet., p. 18) This formulation of the issue misstates the question presented by the facts of this case. Even if, as petitioners inaccurately assert,[19] they repre-

---

[Footnote continued from preceding page.]

scheme of refinancing, either of which, as we have shown, requires the supervision of the Chapter X Court. The fact that such supervision will preserve the absolute priorities among stockholders and also serve an essential purpose of Chapter X, by avoiding the losses to stockholders which would ensue if the Debtor were forced to liquidate its assets in order to pay its creditors, neither minimizes the real need of the creditors for the Court's protection nor perverts Chapter X. *Continental Illinois Nat'l Bank & Trust Co.* v. *C. R. I. & P. R. Co., supra* n. 16; *Campbell* v. *Alleghany Corp., supra* n. 13.

[19] Petitioners purport to represent not only themselves but "all other" 6% and common stockholders of the Debtor (Pet., p. 1), and seek to lend validity to this claim by captioning their petition "Reynald H. Chase, T. Roland Berner, et al., *Petitioners*," and by suggesting that "an entire class seeks dismissal" of the proceeding (Pet., p. 12). In point of fact, petitioner Chase owns only 1800 shares of common stock, which were purchased for an aggregate cost of approximately $500 (R. 20a) and which, like all of the Debtor's common stock, are more than $32,000,000 under water. Petitioner Berner formally represents only himself as the holder of only 1 share of common stock and 1 share of 6% preferred stock. However, it may be noted that his family is interested in the Darien Corporation, and through it, in the underwriting he proposed in urging dismissal below (R. 28-29; see also typed transcript of hearing, Nov. 17, 1950, pp. 78-80). Nothing in the record suggests that either of the petitioners is authorized to represent anybody else in this proceeding. On the contrary, neither of the two 6% Preferred Stockholders' Committees nor the Debtor nor the Common Stockholders' Committee, all of whom have previously appeared in these proceedings and opposed the Trustees' Plan, supported petitioners' position either in the Court below or now supports it in this Court. While nothing in the record sustains the claim that petitioners represent others than themselves in this proceeding, the record does demonstrate that petitioner Berner's interest lies in underwriting the

[Footnote continued on following page.]

sented the entire 6% preferred stockholder class and the entire common stockholder class, no "property" of theirs would be sacrificed. The fact is that those classes of security holders were found to have absolutely no equity in the Debtor. Indeed, the latter class is more than $32,000,000 under water. Accordingly, they not only have no constitutional complaint against being eliminated in this reorganization,[20] but Chapter X, which applies as between classes of stockholders (*Otis & Co.* v. *Securities & Exchange Commission, supra* n. 16), plainly contemplates that they will be eliminated. As this Court pointed out in *Case* v. *Los Angeles Lumber Products Corp., supra,* p. 12 (at pp. 125, 127), "A debtor as well as a creditor who invokes the aid of the federal courts in reorganization or rehabilitation under § 77B assumes all of the consequences which flow from that jurisdiction," and one of those consequences "from the viewpoint of the debtor and its stockholders is the approval of a plan of reorganization which eliminates them completely" when they are found to have no equity.[21]

[Footnote continued from preceding page.]

refinancing scheme he has sponsored, and that he has sought, with partial success at earlier stages in this proceeding, secretly to finance and subsidize various other objectors to the Plan, including petitioner Chase, and to obstruct and delay its consummation (R. 20a-28a. See also typed transcript of hearing, November 17, 1950, pp. 60-86).

[20] *Cf. In re 620 Church Street Building Corp.*, 299 U. S. 24 (1936), rehearing den. 299 U. S. 623 (1936).

[21] Petitioners' interest in the "destruction of going concern values" in an enterprise in which they are found to have no equity contrasts sharply with the destruction of going concern values which would result from the liquidation which they now request. Indeed, this asserted concern of petitioners transparently demonstrates that their real interest is not in preserving the assets of the Estate, which would be diminished upon liquidation, but in obtaining an "interest" for themselves in the dismissed Debtor at the expense of the 7% preferred stockholders, who would, by dismissal, be denied the full compensation to which the absolute priority doctrine entitles them.

3. No decision of this Court or of the lower federal courts conflicts with the decision below. When no plan of reorganization readjusting security holders' rights is necessary because creditors have been paid off,[22] or the funds with which to pay them off are in fact produced,[23] and no other claims remain to be adjusted beyond those of the common stockholders, all of whom seek dismissal, Section 236 of Chapter X does not forbid dismissal if "in the opinion of the judge" dismissal is "in the interests of the creditors and stockholders." Similarly when the debtor's circumstances render a plan of reorganization impossible, the proceeding may be dismissed.[24] But in no case has it ever been suggested that mere solvency of the debtor authorizes or requires dismissal of a reorganization so that a readjustment of security holders' rights might be effected outside of Chapter X.

---

[22] *Sword S. S. Line* v. *Vendramis*, 116 F. (2d) 665 (C. A. 2, 1940).

[23] *In re Realty Associates Securities Corp.*, 65 F. Supp. 116 (E. D. N. Y., 1946), aff'd 156 F. (2d) 480 (C. A. 2, 1946) (involving a corporation all of whose stock was owned by a single individual who provided the funds for payment of all creditors); *In re William Jameson & Co.*, 47 F. Supp. 450 (S. D. N. Y., 1942).

In *Milwaukee-Minn. R. R.* v. *Soutter*, 69 U. S. (2 Wall.) 510 (1865), which involved only the interests of the mortgagee and the debtor (*i. e.*, the owner of the equity of redemption), the Court ruled that the deposit in Court of amounts found necessary to satisfy so much of the mortgagee's claims as were then due left no other rights then to be satisfied or adjusted, so that continuance of the receivership was unnecessary for the protection of security holders' rights; see also *Boston Terminal Co.* v. *Comm. Mutual Savings Bank Committee*, 127 F. (2d) 707 (C. A. 1, 1942).

[24] *John Hancock Mutual Life Insurance Co.* v. *Casey*, 141 F. (2d) 104 (C. A. 1, 1944), cert. den. 323 U. S. 713 (1944), in which the Court concluded that an arrangement under Chapter XI rather than a plan under Chapter X was required for the debtor and, therefore, ordered dismissal of the proceeding. See also *In re Technical Marine Maintenance Co.*, 169 F. (2d) 548, 553 (C. A. 3, 1948); *Loomis* v. *Gila County, Ariz.*, 101 F. (2d) 827 (C. A. 9, 1939).

Indeed, to the extent that the cases cited by petitioners are at all relevant here (because they *permitted* dismissal under Section 236 of Chapter X in circumstances in which, "in the opinion of the judge," the absence of conflicting security holders' claims made a plan of reorganization under judicial supervision unnecessary for "the interests of the creditors and stockholders"), they raised for the District Judge in this case, at best, a question of discretion. If the circumstances here present left the District Judge any discretion, he correctly concluded that dismissal of the reorganization would have been improper.

The specific proposals for refinancing or liquidation which petitioners here suggest should be effectuated free from the safeguards of Chapter X have already been found to be wholly inadequate to meet the standards of Chapter X. Dismissal of the proceeding would result in the creation for the holders of the 6% preferred stock, which is now valueless, and for the holders of the common stock, which is more than $32,000,000 under water, an interest in the Debtor at the expense of the 7% preferred stockholders who would be compelled to remain in the enterprise with huge arrearages still owing to them. The Debtor's financial and corporate structure would be continued essentially in its present unsound form. Substantial leverage and the potential for further increases would inhere in the structure, since the refinancing proposal envisages new debt to replace, in part, existing debt, the continuance of two classes of preferred stock and the continuance of Blue Ridge as a separate entity. Accordingly, while the Debtor would be returned to the business world with some $25,800,000 of dividend arrearages, with remote prospect of ever paying those arrears and meeting current charges, the under-water junior security holders would acquire the "substantial interest in the corporation" which they seek (Pet., p. 4)—the opportunity to speculate with the investment which belongs to the seniors.

Finally, the present scheme of petitioners would result

in even more serious consequences to the 7% preferred stockholders, and indeed to the 6% preferred stockholders. A dismissal would return the Debtor to the control of its present common stockholders, and thus to Harrison Williams, who owns a majority of the Debtor's common stock. Apart from the very real problem of fairness and equity in returning the Debtor to the control of the individual who despoiled it, serious questions exist as to the consequences in such event that might be expected with respect to the enforcement of the Trustees' lawsuit against Williams. Whatever conditions designed to avoid such consequences could be devised for inclusion in an order dismissing this proceeding, those conditions could not assure that a dismissal of this proceeding would not prejudice the recovery in that lawsuit.[25]

Under such circumstances, even if the requirements of Chapter X did not otherwise preclude dismissal of this proceeding, the District Court properly exercised such discretion as it had by refusing to dismiss the proceeding, *cf. In re National Realty Trust*, 166 F. (2d) 632, 635-636 (C. A. 7, 1948). In view of the concurrence of the Court of Appeals in that decision there is no occasion here for further review.

---

[25] See *Williams* v. *Austrian*, 331 U. S. 642 (1947).

Conclusion.

The judgment below is correct. It presents no conflict with decisions here or elsewhere and no question worthy of further review. The petitions should be denied.

Dated: May 24, 1951.

Respectfully submitted,

SAUL J. LANCE
Attorney for Carl J. Austrian and Robert G. Butcher, Trustees of Central States Electric Corporation, Debtor

AUSTRIAN & LANCE
ROBERT G. BUTCHER
GEORGE ROSIER
VICTOR BRUDNEY
Of Counsel

WALTER H. BROWN, JR.
Attorney for Boyce Debenture Holders' Committee

WILLKIE OWEN FARR GALLAGHER & WALTON
DENNY, VALENTINE & DAVENPORT
CHARLES S. VALENTINE
Of Counsel

LEWIS C. WILLIAMS
Attorney for Reeve Debenture Holders' Committee

WILLIAMS, MULLEN, POLLARD & ROGERS
FRED G. POLLARD
Of Counsel

THOMAS C. EGAN
Attorney for 7% Preferred Stockholders' Committee

TUCKER, MAYS, CABELL & MOORE
DAVID J. MAYS
HARRY R. AXELROTH
FRANCIS E. WALTER
Of Counsel

APPENDIX.

Excerpts from Chapter 10 of Title 11, United States Code, Chapter X, National Bankruptcy Act:

Sec. 149. An order, which has become final, approving a petition filed under this chapter shall be a conclusive determination of the jurisdiction of the court. (11 U. S. C. Sec. 549)

Sec. 179. After a plan has been accepted in writing, filed in court, by or on behalf of creditors holding two-thirds in amount of the claims filed and allowed of each class, and, if the debtor has not been found to be insolvent, by or on behalf of stockholders holding the majority of stock, of which proofs have been filed and allowed, of each class, exclusive of creditors or stockholders or of any class of them who are not affected by the plan or whose claims or stock are disqualified pursuant to section 203 of this Act, or for whom payment or protection has been provided as prescribed in paragraphs (7) and (8) of section 216 of this Act, the judge shall fix a hearing, upon notice to the debtor, creditors, stockholders, indenture trustees, the Secretary of the Treasury, the Securities and Exchange Commission, and such other persons as the judge may designate, for the consideration of the confirmation of the plan and of such objections as may be made to the confirmation. (11 U. S. C. Sec. 579)

Sec. 216. A plan of reorganization under this chapter— * * *

(8) shall provide for any class of stockholders which is affected by the plan and does not accept the plan by the majority of the stock required under this chapter, adequate protection for the realization by them of the value of their equity, if any, in the property of the debtor dealt with by the plan, either as provided in the plan or in the order confirming the plan, (a) by the sale of such prop-

erty at not less than a fair upset price; or (b) by appraisal and payment in cash of the value of their stock; or (c) by such method as will, under and consistent with the circumstances of the particular case, equitably and fairly provide such protection: *Provided, however,* That such protection shall not be required if the judge shall determine that the debtor is insolvent; * * *. (11 U. S. C. Sec. 616)

Sec. 236. If no plan is proposed within the time fixed or extended by the judge, or if no plan proposed is approved by the judge and no further time is granted for the proposal of a plan, or if no plan approved by the judge is accepted within the time fixed or extended by the judge, or if confirmation of the plan is refused, or if a confirmed plan is not consummated, the judge shall——

(1) where the petition was filed under section 127 of this Act, enter an order dismissing the proceeding under this chapter and directing that the bankruptcy be proceeded with pursuant to the provisions of this Act; or

(2) where the petition was filed under section 128 of this Act, after hearing upon notice to the debtor, stockholders, creditors, indenture trustees, and such other persons as the judge may designate, enter an order either adjudging the debtor a bankrupt and directing that bankruptcy be proceeded with pursuant to the provisions of this Act, or dismissing the proceeding under this chapter, as in the opinion of the judge may be in the interests of the creditors and stockholders. (11 U. S. C. Sec. 636)

FILED
MAY 31 1951
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

Nos. 753, 754

REYNALD H. CHASE, et al,
Petitioners,

against

CARL J. AUSTRIAN and ROBERT J. BUTCHER, Trustees of Central States Electric Corporation, et al,
Respondents.

PETITIONERS' REPLY MEMORANDUM

ALFRED J. KIRSH
LEO B. MITTELMAN
GEORGE E. ALLEN, SR.
Of Counsel

NORMAN S. NEMSER
Attorney for Petitioners Chase, et al
52 Broadway
New York 4, N. Y.

T. ROLAND BERNER
Common and 6% Preferred Stockholder Pro Se
30 Broad Street
New York 4, N. Y.

IN THE

Supreme Court of the United States

OCTOBER TERM 1950

Nos. 753, 754

REYNALD H. CHASE, et al,
Petitioners,

against

CARL J. AUSTRIAN and ROBERT J. BUTCHER, Trustees of Central States Electric Corporation, et al,
Respondents.

PETITIONERS' REPLY MEMORANDUM[1]

The *per curiam* opinion of the Court of Appeals—handed down after we filed our petition herein to review that

---

[1] Our petition seeks review of both the order confirming the Trustees' Plan and the order denying the application to dismiss. Both raise the identical question, *viz*, whether any Plan may be confirmed and consummated in this case, while the former in addition renews the points previously raised in the appeal from the order approving said Plan. That we did prosecute the confirmation appeal in the Court of Appeals (as well as the appeal from the refusal to dismiss, not denied by our opponents) we think is entirely plain from the fact that Chief Judge Parker advised us that we could present the said appeal by brief *or* oral argument (see Appendix to this Reply Memorandum) and we selected the latter alternative (Petition p. 1, n.)

That we have the full rights of parties in these proceedings, and the status as such of representatives of the entire class, cannot be questioned, Ch. X, Sec. 206 (11 U.S.C. §606); *Young* v. *Higbee*, 324 U.S. 204. We feel it unnecessary to comment in this Court upon the respondents' *ad hominem* arguments although we fear that they may not have been without influence upon the decisions below. By insinuating that the petitioners here and the shareholders owning hundreds of thousands of shares, who are supporting them, do not truly represent the junior security holders, respondents are in effect asking this court to believe that these classes of security holders are in fact content to be wiped out by the trustees' plan.

All the representatives of junior security holders and the Debtor have urged dismissal (R). The Common Stockholders Committee, the only other representatives of the common stock, who were designated by about 1,000,000 shares of common stock, have advised us through their attorney that they join in urging dismissal of the reorganization proceeding by this Court.

court's decision—does not even pose, much less answer, the critical question submitted to it and by the instant petition, to the Supreme Court, for review. That question is whether the court may proceed to reorganize a debtor under Chapter X where there is clearly no longer any need to affect the rights of creditors. Our petition demonstrates, and nothing in the opposing briefs even tends to refute, the decisive proposition that Chapter X, in accordance with basic constitutional and equity concepts, prescribes that no plan shall be confirmed or consummated and rights *inter se* of stockholders shall not be affected, over objection, unless there is still present the prerequisite necessity to affect the rights of creditors.

Search of the opinion below, respondents' briefs, and the record fails to disclose any finding, or any factual basis for a determination, that there is any need to affect the rights of creditors. That the debtor is fully able to pay them off in cash, without sacrifice and without liquidation as a going concern, is clear beyond rational doubt; the contrary was not claimed or found below.

The debtor has on hand $7,372,533 in cash (R 14a). Its controlled subsidiary, Blue Ridge, has cash of $7,112,762 (R 14a) of which two-thirds, or $4,741,841, would go to the debtor on partial distribution.[2] This would give the debtor $12,114,374 to meet total past due indebtedness, including interest, of $9,895,807 (R 12a) and reorganization and other expenses of $500,000 to $1,000,000.[3] Since payment of all past due indebtedness and reorganization expense can be made out of cash on hand, it is obvious that no cost or sacrifice whatsoever can be involved; that no reorganization or assistance of any sort from the court is required, and that no refinancing is necessary.

---

[2] Blue Ridge is a Supplement Q Company able to distribute all its capital gains and income without tax consequences to itself.

[3] The estate has already paid about half a million dollars of reorganization expenses.

After utilization of the cash to pay the past due indebtedness, the debtor would still have about $27,800,000, of which about $1,800,000 would be cash and the balance highly liquid marketable securities, and no debt except $11,737,000 of 5½% debentures due in 1954. On the face of it there can be no question of the debtor's ability to take care of this obligation without difficulty or disturbance.[4]

The contention that immediate cash payment of the creditors would involve a sacrifice is made with "tongue in cheek". This is perfectly apparent, not only from the above uncontested facts, but also from the respondents' earlier admission in another connection (Resp. Br. p. 18, in opposition to certiorari in Nos. 408, 409, 410 and 411):

> "In the case of the Debtor, as with other investment companies, the assets, being freely marketable, can readily be converted into cash *without sacrifice.*" (Italics added)

Clearly, the Court need not take seriously the respondents' turnabout on this point and their purported stand now that cash cannot be realized on cash and cash-equivalent securities without sacrifice. This Court will never have an opportunity to review a clearer case of ability of a debtor to meet all its obligations without reorganization or liquidation.

---

[4] Respondents' computations of tax costs, shrinkage and other asserted difficulties are based upon a number of insupportable assumptions; e.g. (1) that the declaration of the Chase Bank that the 1954 debentures were "matured", which was never passed upon by any court, has any effect; (2) that the debtor for some unexplained reason, will not wish to refinance the issue, although readily able to do so (R28-29) but will rather choose to realize the full $11,737,000 through the sale of portfolio securities; (3) that the debtor will not select for sale those securities which have the highest tax base, will sell indiscriminately and regardless of tax cost, and will not avail itself of other permissible methods of avoiding the tax (R). It is indeed a novel thought that a debtor, possessed of ample marketable assets, should be deprived of the right to pay its obligations simply because it might be called upon, like anyone else, to pay capital gains taxes when it realizes cash upon a sale of those assets. The tax must sooner or later be paid; yet the trustees insist that paying a bond premium of $1,065,000 (R12a) merely to *postpone* a 25% tax on capital gains of $5,558,000 (R14a) constitutes avoiding a sacrifice.

CONCLUSION

The reasons advanced for review in our petition remain wholly unimpaired by anything said in the opinion below or in respondents' opposing briefs.

Respectfully submitted,

T. Roland Berner, *Pro Se*
30 Broad Street
New York, N. Y.

Norman S. Nemser
Attorney for Chase, et al
52 Broadway
New York 4, N. Y.

Of Counsel:
Leo B. Mittelman
George E. Allen, Sr.
Alfred J. Kirsh

APPENDIX

JOHN J. PARKER
UNITED STATES CIRCUIT JUDGE
CHARLOTTE, N. C.

February 23, 1951.

Mr. T. Roland Berner,
30 Broad St.,
New York 4, N. Y.

Re: Central States Electric Corporation, *debtor.*

Dear Sir:

I have your letter of February 19 relative to the above entitled case. I beg to advise that it is not the practice of our court to hear cases by correspondence. If you have anything to say with respect to the appeal in this case you should say it upon the hearing of the case in open court or by the filing of a brief.

Yours very truly,

John J. Parker

JJP/B